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Counsel for Plaintiff Sierra Club

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION**

SIERRA CLUB,)	
)	Case No. 19-cv-2246
Plaintiff,)	
)	
v.)	COMPLAINT FOR DECLARATORY
)	AND INJUNCTIVE RELIEF
UNITED STATES DEPARTMENT OF ENERGY,)	
)	(Freedom of Information Act Case)
)	
Defendant.)	
)	

Plaintiff Sierra Club, through counsel, alleges as follows:

STATEMENT OF THE CASE

1. Plaintiff Sierra Club asserts violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, by Defendant Department of Energy (“DOE” or “Department”) by failing to produce requested agency records in its possession following a lawful request by Sierra Club.

2. Sierra Club’s FOIA request, which is attached hereto as Exhibit A, was submitted on August 13, 2018, and assigned tracking number HQ-2018-01467-F. The request seeks records in four discrete categories that are described in detail in the request. In general, the request seeks

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1 records documenting the scope of Mr. Bernard McNamee's activities during his employment as a
2 senior DOE official, and his engagement with other DOE officials during an intervening period
3 between his two periods of employment at the Department. DOE is now more than seven months
4 past the statutory deadline for its response, and it has not produced a single document nor provided a
5 schedule to produce responsive records.

6 3. Mr. McNamee is currently a Commissioner at the Federal Energy Regulatory
7 Commission ("FERC" or "Commission"), and the scope of his prior activities at the Department, and
8 advocacy to the Department on behalf of other entities, impacts his compliance with ethics laws and
9 standards that apply to FERC Commissioners. The independence, lack of bias, and integrity of
10 FERC Commissioners, including compliance with ethics laws and standards, are matters of great
11 public interest and importance.

12 4. Mr. McNamee was employed by DOE as Deputy General Counsel from May 2017
13 through February 2018. In that capacity, Mr. McNamee was involved in drafting the DOE Notice of
14 Proposed Rulemaking for the Grid Reliability and Resilience Pricing Rule ("DOE NOPR"),¹ and
15 signed the September 29, 2017 letter transmitting the proposed rule to FERC for the Commission's
16 consideration and potential approval. The DOE NOPR alleged that the resiliency of the nation's
17 electric grid is threatened by the retirements of uneconomic power plants, and proposed to afford
18 special compensation to certain, so-called "fuel secure" generators in order to ensure grid resilience.
19 On January 8, 2018, FERC unanimously rejected the DOE NOPR as inconsistent with the Federal
20 Power Act.²

21 5. On or around February 2018, Mr. McNamee commenced working for the Texas
22 Public Policy Foundation. In February 2018, Mr. McNamee gave a speech describing his work on the
23 "Life:Powered" project on behalf of the Texas Public Policy Foundation. Mr. McNamee
24 characterized the project as "being up against" an "organized propaganda campaign against fossil
25 fuels" that has "a lot of money behind [it] . . . raised by the traditional green groups." Mr. McNamee
26 further stated that, "we're losing," but that "we do now have groups working to respond to all this.

27 ¹ Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940 (Oct. 10, 2017).

28 ² Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Different
Procedures, 162 FERC ¶ 61,012 (Jan. 8, 2018).

1 We have industry groups you know, especially some very good ones here in Texas, but also groups
 2 like API at the national level. We have a number of think tanks, TPPF being one of them, but also
 3 Heritage, and some of the others that you've seen up there. We have some action lobbyists groups
 4 that are out there, and then we have some education coalition groups.”³ Upon information and
 5 belief, Mr. McNamee referred to the American Petroleum Institute (“API”), the Texas Public Policy
 6 Foundation (“TPPF”), and the Heritage Foundation (“Heritage”) in this statement. While working at
 7 the Texas Public Policy Foundation, Mr. McNamee spoke of the benefits to the grid of the “fuel
 8 secure” generation that had been the subject of the DOE NOPR.

9 6. On or around June 6, 2018, Mr. McNamee returned to DOE as the Director of the
 10 Office of Energy Policy. Between his return in June 2018 through August 2018, Mr. McNamee
 11 worked on a second proposal to use emergency and national security authorities under the Federal
 12 Power Act and Defense Production Act to support “fuel secure” generation resources on the electric
 13 grid. According to Mr. McNamee, his work on the proposal included researching and trying to work
 14 through the substantive issues, as well as examining the statutes and legal justifications contained in
 15 this second proposal. The public became aware of the second proposal when a 40-page draft
 16 memorandum in support of the proposed action was leaked to the press.

17 7. In October 2018, Mr. McNamee was nominated by the Trump Administration to fill a
 18 vacancy on FERC. Mr. McNamee was confirmed by the Senate on December 6, 2018, and sworn in
 19 to the Commission on December 11, 2018.

20 8. On December 6, 2018, the Harvard Electricity Law Initiative filed comments arguing
 21 that Mr. McNamee must recuse himself from all dockets and from other matters that concern rates
 22 for “fuel secure” generators.⁴ On December 18, 2018, a coalition of environmental organizations,
 23 including Sierra Club, filed a motion seeking Mr. McNamee’s recusal from two particular dockets
 24
 25
 26

³ Bernard McNamee, Remarks at the Texas Public Policy Foundation Policy Orientation 2018, “Life:Powered, How Fossil Fuels Impact Life Today” (Feb. 2018),
https://www.youtube.com/watch?v=feGG6h_Dxgk.

⁴ Comment of the Harvard Electricity Law Initiative, FERC Docket Nos. RM18-1 & AD18-7 (Dec. 6, 2018).

1 related to the DOE NOPR in order to comply with due process requirements and Office of
2 Government Ethics regulations.⁵

3 9. A January 2, 2019 memorandum from the FERC Designated Agency Ethics Official,
4 Charles A. Beamon, to Mr. McNamee (attached hereto as Exhibit B) summarizes the ethics advice
5 received related to Mr. McNamee's recusal obligation. The memorandum indicates that Mr.
6 McNamee recused himself from the DOE NOPR docket due to his involvement in drafting the DOE
7 NOPR and his signature in transmitting the proposal to FERC. With respect to the second related
8 proceeding, Mr. Beamon cautioned that if the docket develops in such a way as to "replicate or
9 closely resemble" the DOE NOPR docket, Mr. McNamee must recuse himself from that proceeding
10 as well.⁶ Finally, Mr. Beamon states that "[a]s to comparable matters, my determination will depend
11 on the facts of each specific matter as analyzed under the appropriate legal standards."⁷

12 10. The records Sierra Club seeks in its FOIA request will document the scope of Mr.
13 McNamee's work at DOE. Responsive documents may include records that document his
14 engagement on matters such as rate proposals to advantage fossil fuel generation over other
15 technologies that serve the grid, matters which may be subject to FERC review. Sierra Club also
16 seeks records of communications between Mr. McNamee and DOE officials during any period after
17 January 2017 when Mr. McNamee was not employed by DOE. Responsive records may, for
18 example, document any efforts by Mr. McNamee to advocate for particular policies, market reforms,
19 or rate proposals to his former DOE colleagues while working for the Texas Public Policy
20 Foundation campaign to provide additional advantages to the fossil fuel industry. The records Sierra
21 Club seeks are critical to understanding the potential for bias and whether Mr. McNamee should
22 recuse himself from ongoing or future proceedings at FERC.

23 11. To date, DOE has not provided a final determination on Sierra Club's August 13,
24 2018 FOIA request, and DOE has not produced any records in response to the request or provided
25

26 ⁵ Clean Energy Advocates, Motion for Recusal of Commissioner McNamee, FERC Docket Nos.
RM18-1 & AD18-7 (Dec. 18, 2018).

27 ⁶ Memorandum from Charles A. Beamon, Designated Agency Ethics Official, on Summary of Ethics
Guidance to Commissioner Bernard L. McNamee, at 2 (Jan. 2, 2019).

28 ⁷ *Id.* at 6.

any date by which it will do so. As a result, DOE has failed to provide a complete and lawful response to Sierra Club's request within the timeframe required by FOIA.

JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

13. Venue is proper in this district because plaintiff Sierra Club resides and has its principal place of business in Oakland, California. 5 U.S.C. § 552(a)(4)(B).

14. For the same reason, intradistrict assignment is proper in the Oakland Division. *See* N.D. Cal. L.R. 3-2.

PARTIES

15. Plaintiff Sierra Club was founded in 1892 and is the nation's oldest grassroots environmental organization. Sierra Club's national headquarters is located in Oakland, California. Sierra Club is a non-profit, membership organization incorporated in California with more than 828,000 members in all 50 states and the District of Columbia. Sierra Club's purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

16. Sierra Club is a leading non-governmental organization that seeks to educate and mobilize the public on public health and environmental issues such as clean air, clean water, and climate change.

17. Sierra Club routinely uses FOIA requests to obtain information from federal agencies, which Sierra Club's legal and policy experts analyze in order to inform their members and the public about public health and environmental issues. Sierra Club regularly conveys important information to its members and the public through publications and press releases, as well as by publicly releasing information and documents obtained through FOIA requests.

18. Sierra Club brings this action on its own behalf and on behalf of its members. Sierra Club and its members have been and continue to be injured by DOE's failure to provide requested records within the timeframe mandated by FOIA. The requested relief will redress these injuries.

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19. Defendant DOE is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1), and has possession or control of the records that Sierra Club seeks in this action.

LEGAL BACKGROUND

20. Enacted in 1966, the Freedom of Information Act was designed to protect citizens' "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (internal quotations omitted). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The statute was intended "to permit access to official information long shielded unnecessarily from public view and . . . to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973).

21. To this end, FOIA requires agencies of the federal government to release, upon request, information to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. § 552(a)(3)(A). These exemptions are narrowly construed, and the agency bears the burden of establishing the applicability of each exemption as to each record for which it is claimed. *See Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011); *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir. 2009) (noting FOIA's "strong presumption in favor of disclosure" and that an agency bears the burden for demonstrating an exemption properly applies).

22. Upon receiving a FOIA request, an agency has twenty working days to respond by determining whether responsive documents exist and whether the agency will release them. 5 U.S.C. § 552(a)(6)(A); 10 C.F.R. § 1004.5(d). Agencies must make reasonable efforts to search for records in a manner that is reasonably calculated to locate all records that are responsive to the FOIA request. 5 U.S.C. § 552(a)(3)(C)–(D). An agency may delay an initial determination by ten working days only if the agency can demonstrate that it faces "unusual circumstances." 5 U.S.C. § 552(a)(6)(B); 10 C.F.R. § 1004.5(d)(2). FOIA further requires agencies to make records themselves "promptly available" to requesting parties. 5 U.S.C. § 552(a)(3)(A).

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23. If an agency withholds responsive records, in whole or in part, the burden is on the agency to prove that an exemption applies and that it outweighs FOIA's policy of disclosure. *See, e.g.,* 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991).

24. Whenever an agency determines that a portion of a record should be withheld under one of FOIA's exemptions, the agency must still release to the public any portions of that record that contain "reasonably segregable" non-exempt information. 5 U.S.C. § 552(b).

25. If an agency makes an initial determination that it will deny a FOIA request in whole or in part, the requester is entitled to administratively appeal the determination. 5 U.S.C. § 552(a)(6)(A)(ii). DOE regulations provide that a requester must file such an appeal within 90 days. 10 C.F.R. § 1004.8(a). FOIA requires the agency to make a determination with respect to an administrative appeal of a denial of a request within twenty working days. 5 U.S.C. § 552(a)(6)(A)(ii); 10 C.F.R. § 1004.8(d).

26. If the agency fails to comply with the statutory time limits to respond to a FOIA request or appeal, the requester is deemed to have exhausted its administrative remedies and may commence litigation in district court to compel an adequate response from the agency. 5 U.S.C. § 552(a)(4)(B), (a)(6)(C)(i). FOIA provides that the district court shall have jurisdiction "to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

27. FOIA and DOE's regulations state that a requester is entitled to a waiver of fees associated with responding to a FOIA request when the information sought "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 10 C.F.R. § 1004.9(a)(8). Further, an agency cannot assess fees against a requester if it does not respond to the request within the time established by FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(viii).

28. FOIA permits the Court to "assess . . . reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i).

FACTUAL BACKGROUND

29. On August 13, 2018, Sierra Club submitted a FOIA request to DOE seeking records documenting the scope of Mr. Bernard McNamee's activities during his two periods of employment at DOE, as well as his engagement with other DOE officials during an intervening period between his two periods of employment at the Department. Sierra Club's request is attached as Exhibit A. The Sierra Club FOIA request identified four specific categories of records that were requested, providing for each category a detailed description of the records sought.

30. On August 14, 2018, DOE sent an automated response acknowledging receipt of Sierra Club's FOIA request and assigning it tracking number HQ-2018-01467-F.

31. On August 15, 2018, DOE sent an "interim response" to Sierra Club stating that Sierra Club's request qualifies for a fee waiver. DOE did not provide a timeframe for its response to Sierra Club's FOIA request, only stating that the request had been assigned and that Sierra Club would be provided a response upon completion of the search and review of any records located. The August 15, 2018 DOE letter is attached as Exhibit C.

32. Pursuant to FOIA, DOE's determination of Sierra Club's request was due 20 days after August 13, 2018, or September 3, 2018.

33. Subsequent to the August 15, 2018 letter, Sierra Club communicated with DOE several times regarding the FOIA request in an effort to facilitate its timely completion and to urge DOE to provide a production schedule. To date, Sierra Club has not received any response from DOE to its FOIA request. DOE has not made any final determination in response to Sierra Club's FOIA request, nor has DOE released any agency records in response to the request.

CLAIM FOR RELIEF

34. Plaintiffs hereby reallege and incorporate by reference all allegations in the preceding paragraphs.

35. By failing to make a final determination or produce records in response to Sierra Club's August 13, 2018 FOIA request, DOE has violated FOIA's mandate to provide a complete response and "promptly" release agency records within the timeframe required by the statute. *See* 5 U.S.C. § 552(a)(3)(A), (a)(6).

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- 1 36. DOE has wrongfully withheld the requested records from Sierra Club.
2 37. Sierra Club has exhausted the applicable administrative remedies.
3 38. Sierra Club is entitled to obtain the requested records immediately at no cost.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiffs respectfully request that this Court:

- 6 (1) Declare that DOE has violated FOIA by failing to provide all records responsive to Sierra
7 Club's FOIA request;
8 (2) Order that DOE make all requested records available to Sierra Club promptly and at no
9 cost;
10 (3) Retain jurisdiction over this case to rule on any assertions by DOE that any responsive
11 records, in whole or in part, are exempt from disclosure;
12 (4) Award Sierra Club's litigation costs and reasonable attorneys' fees in this action; and
13 (5) Order such other relief as the Court may deem just and proper.

14 DATED: April 25, 2019

15 Respectfully submitted,

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